

**From:** Al Davis  
**To:** Microsoft ATR  
**Date:** 1/26/02 4:56am  
**Subject:** Proposed anti-trust settlement

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**CC:** davisal@usa.net@inetgw

Albert R. Davis, MD  
438 May Street  
Elmhurst, IL 60126

Renata Hesse, Trial Attorney  
Suite 1200, Antitrust Division  
Department of Justice  
601 D Street NW, Washington, DC 20530

January 25, 2002

Dear Ms. Hesse,

I would like to take this opportunity to forward my comments to you regarding the proposed anti-trust settlement in the case of USDOJ v Microsoft.

I am an anesthesiologist by profession, but have used personal computers since purchasing my first in 1982, and have an undergraduate degree in Accounting and Business Data Systems. I have maintained a strong interest in computers since 1982 and have business experience both as a programmer and as the owner of a computer sales firm.

I want to make it clear at the outset that I am completely opposed to the settlement as proposed. Microsoft's reasons for their position are specious, at best, and the proposal offers neither remedy for Microsoft's past transgressions nor protection from further abuse of both competing interests and the public at large.

As you know, Microsoft was essentially born with a silver spoon in its mouth. The company was initially granted a contract to provide IBM with an operating system for their then-new PC, which at the time immediately overran the PC world and rapidly eliminated virtually all of IBM's hardware competition in terms of non-IBM based architecture. While IBM developed an open architecture for their hardware, Microsoft immediately and aggressively pursued supplier contracts with IBM's competitors, thus very rapidly achieving a monopoly position in terms of operating system market share. By the time IBM introduced the PC-XT, Microsoft held well over 50% of the OS market, including the PC-DOS product sold by IBM under license from Microsoft.

In the mid-1980s the limitations of MS-DOS were becoming apparent and IBM and Microsoft started work on what eventually became IBM's OS/2 and Microsoft's Windows NT. Meanwhile, Microsoft initiated sales of their DOS-based Windows product. While early Windows products languished, Microsoft made enormous profits from sales of DOS which they used not only to improve Windows but, more importantly, to buy influence in the PC press and among manufacturers. At a time when PC Magazine often contained more than 400 pages per issue Microsoft bought enormous quantities of ad space, and the largesse of their parties at trade shows and media events was legendary. Microsoft was certainly a major force in the industry and until this point the company was an all-American success story of luck combined with high energy and intelligent business maneuvers.

MS-DOS was essentially unchanged from its initial versions until the release of version 4, at which point Microsoft began to write code designed to take advantage of improvements in PC architecture. Its early experience was dismal however, and not only did Microsoft receive its first substantial criticism in the press, it also left itself open for the first time to competition from competing software firms. It was Microsoft's response to this competition - Quarterdeck's desqView and its associated memory management software, QEMM - that led to my first personal encounter with their detrimental and predatory practices. To make a long story short, I found that Microsoft's Windows 3.0 installation routine searched for a memory manager product from Quarterdeck called QEMM. If it found QEMM, Windows would refuse to install. QEMM released patches, and Microsoft promptly came up with new ways to seek out QEMM and refuse to install. The issues were not related to incompatibility or instability - QEMM was a clearly superior

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product. The entire situation was due to Microsoft's intentional and deliberate willingness to sacrifice the user's time and money in order to defeat Quarterdeck in the memory manager application space. Quarterdeck ultimately declared bankruptcy in the early '90s. This was about the same time period that Microsoft first became noticed within the industry for possible antitrust violations because of a series of alleged patent infringements and copywrite violations against various companies writing software utilities designed to enhance the performance of Windows. In every case, however, Microsoft succeeded in either appropriating technology or simply driving companies out of business because they had such enormous cash flows that no single small competitor stood a chance against them in court.

This was also the time period when Microsoft began to impose what is now called the "Microsoft tax" on PC buyers. Microsoft began to write exclusive, "per-processor" royalty agreements with computer sellers, which meant that anyone who bought a PC was forced to buy the current version of Windows whether they intended to use it or not. The exclusive nature of those contracts prevented PC retailers from offering any OS other than Microsoft's, and the per-processor tactic forced PC buyers to pay for an MS OS even if they wanted a computer with no OS on which they would subsequently install a non-MS OS. While the "per-processor" clauses may have been eliminated by Microsoft's 1995 consent decree, the fact remains that it is nearly impossible today for an individual to purchase a PC which does not have Microsoft's OS de jour installed on it. In 1995, however, when I went shopping for a PC with IBM's OS/2 OS installed on it, I was unable to find one, despite contacting each of the top 10 PC manufacturers in business at the time. In every case, I was told that I would have to purchase a PC with Windows on it; buying a PC with no OS was not an option. That was the year I began to build my own computers, which is a practice I continue today for essentially the same reasons.

Microsoft's business practices from the early 1990s to today are, I'm sure, well known to you. While Microsoft's legal strategy throughout the antitrust struggle has focused on "innovation", the fact is that their business strategy has been much more focused on acquisition. Today OS/2 is not available on any retail PC that I am aware of, and Linux is supported only as a grudging concession to user demands by companies which are afraid to anger Microsoft.

Microsoft's monopoly has indeed been bad for the industry - witness the decrease in the size and number of both popular and trade journals and magazines, despite the ever present growth of the PC industry (until this year.) Consider that OS/2, which has had practically zero support from IBM since 1988, is still in use in banks and insurance companies across the country. Imagine the growth and innovation which might have arisen from this radically different OS had they had the benefit of a fair sales environment for the past decade. Linux, which is certainly the most innovative business model of the past 50 years, and which offers direct competition to Microsoft, has been stifled much more by Microsoft's strong-arm techniques than by the shortcomings of its sales approach. Even when one considers what is called the "network effect" of an OS which tends to generate pressure towards a monopolistic economic model, the network effect alone cannot begin to account for the inability of either of these equivalent (if not superior) operating systems to affect Microsoft's market share.

Microsoft's monopoly has been equally bad for consumers. The vast majority of computer users simply are not equipped by either propensity or training to become software experts any more than the average driver is equipped to become a mechanic. In the automobile industry reliability has become a given precisely because of that fact. In the Microsoft dominated OS industry, however, unreliability has become a fact of life, to the extent that having a friend or neighbor with computer experience is often listed as an important factor in the computer purchase decision. Microsoft's monopoly position has allowed them to abrogate their support responsibility towards their customers almost completely; since the vast majority of OS sales occur in tandem with new computer sales, and since Microsoft now requires many OEMs to support Windows for them, Microsoft has lost practically all incentive to design

reliable products. They are pouring their time and expertise into the acquisition and development of new technology, while caring little for the reliability of their current products. The time and expense costs to both individuals and businesses is enormous; it is common to hear stories of upgrades that never happen because "We finally got it working right, and we don't want to mess with it."

The current proposed anti-trust agreement is completely unsuited to solving the problems which exist today because of Microsoft's monopoly, but there is a simple, fair solution. Rather than writing a detailed, convoluted agreement which attempts to address a myriad of problems in a very specific way, each of which can easily be circumvented, the DOJ can achieve the goals of fair business practices, customer service improvement and the elimination of an illegally maintained monopoly through two simple actions.

First, the DOJ should prohibit Microsoft from selling any of its software as part of a hardware "bundle" for a period of at least five years. Microsoft should be allowed to sell directly, through retail, as a contracted supplier to business or by any other means possible, as long as their products are not bundled with, contingent upon or in any other way linked to the sale of computing hardware unless the hardware is manufactured by Microsoft (such as their mouse, but even including a complete PC should they choose to manufacture one.)

Second, Microsoft should be forbidden from purchasing any company outright, obtaining a majority share in any company or exclusively licensing any company's technology for an equally long time period.

The application of these two constraints will meet all of the DOJ's requirements while not placing unfair, irresponsible or destructive mechanisms in place against the company. Forcing Microsoft to sell its products to the public rather than to OEMs will finally allow the general public to become aware of Microsoft's competition simply because they will see it in the store when they shop; business users, meanwhile, will be able to negotiate with Microsoft for the products they need without the necessity of factoring the "Microsoft tax" into their purchasing decisions. Placing responsibility for the sale back into Microsoft's hands will also require them to once again consider the reliability and stability of their products - performance issues will no longer be "someone else's problem." Installation, maintenance and compatibility will all benefit from Microsoft's assumption of this responsibility.

By forbidding Microsoft from gaining exclusive control of computing technology, the restriction against purchasing/exclusive licensing will ensure that Microsoft will not be able to use their 80 billion dollar cash hoard to simply shut out the competition from innovation. Microsoft may obtain new technology as it evolves in the industry, but they must be restrained from preventing their competitors from accessing that same technology.

These two constraints are simple, difficult to circumvent, easily enforceable and reasonably achievable. While economic shifts are anticipated from any effective remedial measures, these restrictions will ensure that the market changes will be relatively gradual and non-disruptive to the company. Assuming that the market responds to the public's need for simple installation and operation of computer OSs the impact on the public will be minor. The additional expense of purchasing an OS will be offset by the decline in hardware prices. While these remedies would not prevent a Microsoft competitor from attempting to obtain exclusive licensing agreements with OEMs, the practical residual effects of Microsoft's current monopoly would make it unlikely for any OEM to sign such agreements.

Microsoft has transformed over the years from a lucky, plucky company in the right place at the right time into a malicious behemoth interested only in the domination of its competition without regard to the best interests of its own customers. The currently proposed remedies do not substantially

alleviate this transformation, and some other means must be found to re-introduce real innovation and competition into a vital sector of the American economy.

I hope you will give serious consideration to these comments, and I appreciate your attention.

Sincerely,

Albert R. Davis, MD

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